Bintulu Lumber Development Sdn Bhd v Superintendent of Lands and Surveys, Miri Division

HIGH COURT (MIRI) — CASE NO 15–04 OF 2009(MR)/2
RAVINTHRAN JC
16 MARCH 2012

Evidence — Expert evidence — Valuers — Both valuers had difference of opinion on method of valuation — Whether opinion of court should prevail — Sarawak Land Code s 64

Land Law — Compulsory acquisition — Compensation — Objection to compensation sum awarded — Whether objector successfully challenged method of valuation of government valuer — Whether respondent failed to give adequate consideration to real market value of land and crop of mature oil palm trees on land — Whether objector could claim for severance — Whether objector entitled to additional claim for damages — Sarawak Land Code ss 51, 56, 60(1)(c), (d), 64 & 67(c)

The Sarawak Government compulsorily acquired 28.69 hectares of land ('the land'), which was part of a large oil palm plantation owned by Bintulu Lumber Development Sdn Bhd ('the objector'). The land was acquired for the purpose of the 'Sabah-Sarawak Gas Pipeline'. Pursuant to an inquiry under s 51 of the Sarawak Land Code ('the SLC'), the respondent awarded the objector a total compensation of RM296,387 for the land. The objector accepted the compensation sum under protest and hence the present land reference proceeding under s 56 of the SLC to displace the respondent's award. The objector objected on the grounds that the respondent failed to give adequate consideration to the real market value of the land and the crop of mature oil palm trees on the land. The objector argued that the government valuer by using the sales of vacant land as comparables and thereby assessing the market value of the land at RM4,000 per hectare had ignored the improved value of the land, ie the crop of mature oil palm trees on the land. The government valuer explained that she had compensated the objector for the 3,876 oil palm trees on the land at RM48 per tree based on the crop compensation table found in a departmental circular. She thus submitted that the total compensation that she calculated was RM114,760 for the land plus RM181,627 (3,876 x RM48) for the oil palm trees, which equalled to RM296,387. The objector submitted that the crop compensation table had no force in law and was not accepted by the Malaysian Board of Valuers. This court had to determine whether the objector had successfully challenged the method of valuation of the

government valuer and if so to determine the fair market value of the land. In determining the fair market value of the land the court was assisted by the objector's valuer and the respondent's valuer, who were both qualified valuers. Although both assessors were of the opinion that the assessment of RM4,000 per hectare by the government valuer was unfair as it did not take into account the improved value of the land, both of them had a difference of opinion on the method of valuation. The primary method used by the objector's valuer was the discounted cash flow method ('the DCF method'), an income based method where the amount of cash inflow from sales of produce from the plantation and cash outflow due to expenses after taking into account variables such as world palm oil prices and market conditions was used to estimate the value of the oil palm land. The objector's valuer's assessment of the market value of the land after using the DCF method was RM594,512.55 or RM20,721 per hectare. The alternative method employed by the objector's valuer was the use of sales of plantation companies as comparables. The respondent cited a land reference case under s 56 of the SLC, namely Usaha Sepadan Sdn Bhd v Superintendent of Lands ('the Sepadan case'), in which the Superintendent had awarded compensation for the acquired oil pam land at RM25,000 per hectare. In addition, the objector also claimed that he had suffered damages of RM3,610,442 when the Superintendent took possession of the land.

Held, assessing the total compensation at RM631,180 with interest and no order as to costs:

(1) Under s 64 of the SLC, in the case of a difference of opinion between the court and the assessors, or either of them, the opinion of the court shall prevail. This court rejected the DCF method and the use of the sale of equity of plantation companies as comparables. It also found that the method of the government valuer was not acceptable in this case. The normal comparison method of valuation would have entailed using sales of land planted with matured oil palm trees in the vicinity of the land. However, neither the government valuer nor the objector's valuer produced such comparables. In the circumstances, the previous acquisition award in the Sepadan case furnished by the respondent's valuer was used as a comparable as there were sufficient similarities for the use of the said acquisition award as a comparable. Since the land in the Sepadan case was valued by the Superintendent at RM25,000 per hectare with a 20% downward revision, this court assessed the market value of the land in the present case at RM20,000 per hectare. As such, the market value of the 28.69 hectares of land in the present case was RM573,800 with a further 10% upward revision for severance. Thus, the total amount of compensation awarded to the objector was RM631,180 (RM573,800 + 57,380). After taking into account the amount of RM296,387 already received by the objector, the government was liable to pay the difference ie RM334,793 (see paras 17–19 & 24).

(2) In respect of the additional claim for damages suffered by the objector, this court found that the costs of rectification due to pipeline clearing and the construction of new bridges and roads were not sustained by the objector at the time of the acquisition of the land. It was the court's view that the use of the past tense in s 60(1)(c) and (d) of the SLC, ie 'damage if any sustained' meant that only actual loss at the time of resumption of the land by the Superintendent was envisaged and not future loss occasioned by a third party. Therefore the additional claim for damages was disallowed (see para 23).

(3) There was no order as to costs in accordance with s 67(c) of the SLC (see para 24).

[Bahasa Malaysia summary

Kerajaan Sarawak secara wajib memperoleh 28.69 hektar tanah ('tanah tersebut'), yang merupakan sebahagian ladang kelapa sawit yang besar dimiliki oleh Bintulu Lumber Development Sdn Bhd ('pembantah'). Tanah tersebut telah diperoleh bagi tujuan 'Sabah-Sarawak Gas Pipeline'. Menurut siasatan di bawah s 51 Kanun Tanah Sarawak ('KTS'), responden telah mengawardkan pembantah dengan pampasan sejumlah RM296,387 untuk tanah tersebut. Pembantah telah menerima jumlah pampasan itu dengan bantahan dan justeru itu prosiding rujukan tanah tersebut di bawah s 56 KTS untuk mengubah award responden. Pembantah membantah atas alasan bahawa responden telah gagal untuk memberikan balasan mencukupi untuk nilai pasaran sebenar tanah tersebut dan tanaman pokok kelapa sawit yang telah matang atas tanah tersebut. Pembantah berhujah bahawa penilai kerajaan dengan menggunakan jualan tanah kosong sebagai perbandingan dan dengan itu menaksir nilai pasaran tanah tersebut berjumlah RM4,000 sehektar persegi telah tidak menghiraukan nilai tanah tersebut yang bertambah baik, iaitu tanaman pokok kelapa sawit yang matang atas tanah tersebut. Penilai kerajaan menjelaskan bahawa dia telah memberi pampasan kepada pembantah untuk 3,876 pokok kelapa sawit atas tanah tersebut pada RM48 sepokok berdasarkan jadual pampasan tanaman yang diperoleh dalam pekeliling jabatan. Dia dengan itu berhujah bahawa jumlah pampasan yang dikira olehnya adalah RM114,760 untuk tanah tersebut ditambah RM181,627 (3,876 x RM48) untuk pokok kelapa sawit, yang sama RM296,387. Pembantah berhujah bahawa jadual pampasan tanaman tiada kuasa dari segi undang-undang dan tidak diterima oleh Lembaga Penilai Malaysia. Mahkamah ini perlu menentukan sama ada pembantah telah berjaya mencabar cara penilaian penilai kerajaan dan jika sedemikian untuk menentukan nilai pasaran yang adil ke atas tanah tersebut. Dalam menentukan nilai pasaran yang adil ke atas tanah tersebut mahkamah dibantu oleh penilai pembantah dan penilai responden, yang kedua-duanya penilai yang berkelayakan. Walaupun kedua-dua penaksir berpendapat bahawa penaksiran RM4,000 sehektar oleh penilai kerajaan adalah tidak adil kerana ia tidak mengambil kira nilai yang bertambah baik, kedua-duanya

mempunyai perbezaan pendapat tentang cara penaksiran. Cara utama yang digunakan oleh penilai pembantah adalah cara aliran tunai yang diberi diskaun ('cara ATD'), pendapatan yang berdasarkan cara di mana jumlah aliran masuk tunai daripada jualan produk daripada tanaman dan aliran keluar tunai akibat perbelanjaan setelah mengambil kira pemboleh ubah seperti harga dunia minyak kelapa sawit dan keadaan pasaran yang digunakan untuk menganggarkan nilai tanah kelapa sawit. Penaksiran penilai pembantah berhubung nilai pasaran tanah tersebut setelah menggunakan cara ATD adalah RM594,512.55 atau RM20,721 sehektar. Cara alternatif yang digunakan oleh penilai pembantah adalah dengan menggunakan jualan syarikat tanaman sebagai perbandingan. Responden memetik kes rujukan tanah di bawah s 56 KTS, iaitu *Usaha Sepadan Sdn Bhd v Superintendent of Lands* ('kes *Sepadan*'), di mana Penguasa telah mengawardkan pampasan untuk tanah kelapa sawit yang diperoleh pada RM25,000 sehektar. Tambahan pula, pembantah juga mendakwa bahawa dia telah mengalami kerugian RM3,610,442 apabila Penguasa mengambil milikan tanah tersebut.

Diputuskan, menaksir jumlah pampasan pada RM631,180 dengan faedah dan tiada perintah untuk kos:

(1) Di bawah s 64 KTS, dalam kes perbezaan pendapat antara mahkamah dan penaksir-penaksir, atau antar mereka, pendapat mahkamah hendaklah kekal. Mahkamah ini menolak cara ATD dan penggunaan jualan ekuiti syarikat tanaman sebagai perbandingan. Adalah juga didapati bahawa cara penaksir kerajaan tidak boleh diterima dalam kes ini. Cara perbandingan biasa adalah dengan menggunakan jualan tanah yang ditanam dengan pokok kelapa sawit yang telah matang dalam kawasan tanah tersebut. Walau bagaimanapun, penaksir kerajaan mahupun penaksir pembantah tidak mengemukakan perbandingan sedemikian. Dalam keadaan berikut, award pemerolehan terdahulu dalam kes *Sepadan* yang dikemukakan oleh penaksir responden telah digunakan sebagai perbandingan kerana terdapat persamaan yang mencukupi untuk menggunakan award pemerolehan tersebut sebagai perbandingan. Oleh sebab tanah dalam kes *Sepadan* dinilai oleh Penguasa pada RM25,000 sehektar dengan harga menurun 20%, mahkamah ini menaksir nilai pasaran tanah tersebut dalam kes ini pada RM20,000 sehektar. Oleh itu, nilai pasaran 28.69 hektar tanah dalam kes ini adalah RM573,800 dengan harga kenaikan tambahan 10% sebagai pemutusan. Oleh itu, keseluruhan jumlah pampasan yang diawardkan kepada pembantah adalah RM631,180 (RM573,800 + 57,380). Setelah mengambil kira jumlah RM296,387 telah pun diterima oleh pembantah, kerajaan bertanggungjawab membayar perbezaan iaitu RM334,793 (lihat perenggan 17–19 & 24).

(2) Berhubung tuntutan tambahan untuk kerugian yang dialami oleh pembantah, mahkamah ini mendapati bahawa kos pembaikan akibat

saluran paip yang dibersihkan dan pembinaan jambatan dan jalan baru tidak dikekalkan oleh pembantah pada masa pemerolehan tanah tersebut. Adalah pendapat mahkamah bahawa penggunaan kala lampau dalam s 60(1)(c) dan (d) KTS, iaitu 'damage if any sustained' bermaksud bahawa kerugian sebenar hanya pada masa tanah tersebut diperoleh oleh Penguasa adalah dijangkakan dan bukan kerugian masa hadapan oleh pihak ketiga. Oleh itu tuntutan tambahan untuk ganti rugi tidak dibenarkan (lihat perenggan 23).

(3) Tiada perintah untuk kos menurut s 67(c) KTS (lihat perenggan 24).]

Notes

For a case on compensation, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2885.

Cases referred to

Austral Enterprise Bhd v The Superintendent of Land And Survey, Bintulu Division (Land Reference No 15–02 of 2006(BTU) (unreported) (refd)

Bukit Rajah Rubber Co Ltd v Collector of Land Revenue, Klang [1968] 1 MLJ 176 (refd)

Choo Oh Kim & Ors v Mok Yuen Lok & Ors (Naza Properties Sdn Bhd, intervener) [2005] 6 MLJ 49, HC (refd)

Glory Century Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2000] MLJU 419 (refd)

Guan Seng Co Ltd, Taiping v Pentadbir Tanah Daerah Larut dan Matang, Taiping [1994] 1 MLJ 4, HC (refd)

Nanyang Manufacturing Co v The Collector of Land Revenue, Johore [1954] MLJ 69 (refd)

Ng Bee & Anor v Collector of Land Revenue, Kuala Pilah [1972] 1 MLJ 269 (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35, FC (refd)

Ong Yan & Anor v Collector of Land Revenue, Alor Gajah, Malacca [1986] 1 MLJ 405 (refd)

Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth v Bertam Consolidated Rubber Co Ltd [1990] 1 MLJ 268, FC (refd)

Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd [1992] 1 MLJ 331, SC (refd)

Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd [1966] 1 MLJ 243, FC (refd)

Usaha Sepadan Sdn Bhd v Superintendent of Land and Survey, Bintulu Division (No 15–02 of 2009 (BTU)), HC (refd)

Vyricherla Narayana Gajapatiraju (Raja) v The Revenue Divisional Officer, Vizagapatam [1939] AC 302, PC (refd)

Wangsa Mujur Sdn Bhd v The Superintendent of Lands and Surveys, Miri Division and two other cases (Land Reference Nos 15–01 of 2009 (MR)/1 15–02 of 2009 (MR)/2 and 15–02 of 2009 (MR)/2), HC (folld)

Zawasima Sdn Bhd v Superintendent of Land Surveys Kuching Division [2006] 7 MLJ 488, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5
Sarawak Land Code (Cap 81) ss 51, 56, 60(1)(c), (d), 64, 67(c)

Jason Wong (Kadir, Wong, Lin & Co) for the objector.
Ivy Suli Untup (State Attorney General Chambers) for the respondent.

Ravinthran JC:

INTRODUCTION

[1] This is a land reference proceeding under s 56 of the Sarawak Land Code (Cap 81). The objector owns a large oil palm plantation in the Miri Division. The total acreage of the plantations is 8,062 hectares. It comprises two lots of land namely Lot 54 and Lot 40 of Sawai Land District. The Sarawak Government compulsorily acquired 28.69 hectares of the plantation on 30 November 2006. The land was acquired for the purpose of the 'Sabah-Sarawak Gas Pipeline' project which was managed by a Federal agency namely, Petroliam Nasional Bhd (Petronas).

AWARD OF SUPERINTENDENT

[2] Pursuant to an inquiry under s 51 of the Sarawak Land Code, the superintendent awarded total compensation of RM296,387 for the 28.69 hectares of land that was resumed by the government. The objector accepted the said compensation sum under protest and hence this inquiry under s 56 of the Land Code. The objector called five witnesses and the respondent called one witness. The assessors who assisted the court were qualified valuers, namely Hj Radzali Alision, a private valuer and Norhisam bin Shafie, from the Department of Properties and Valuation.

BURDEN OF PROOF

[3] It is trite law that the burden of proof to displace the superintendent's award lies on the objectors. In the case of *Ong Yan & Anor v Collector of Land Revenue, Alor Gajah, Malacca* [1986] 1 MLJ 405, it was held that:

In land acquisition cases the burden is on the applicant to make out a prima facie case of inadequate award. Only when he succeeds in doing so would the respondent be called upon to introduce his evidence; otherwise the applicant's case must fail and the collector's award should stand.

[4] In the premise, unless I am satisfied that the objector has proved that the award of the superintendent is inadequate, I need not consider the evidence of the superintendent or disturb his award.

GROUND OF OBJECTION

[5] The original ground of objection in the notice of objection was that the superintendent failed to give adequate consideration to the real market value of the said land and the crop of mature oil palm trees on the said land. After the completion of the trial, the objector made an application to amend the notice of objection. The purpose of the application was to expand the above ground to include the objection that the superintendent only used sales of vacant land as comparables and that he did not consider the improved value of the land. I dismissed the application without considering the merits because I was of the opinion that a notice of objection which is a document filed with the Superintendent of Lands and Surveys Department under s 56 of the Sarawak Land Code, cannot be amended under O 20 r 5 of the Rules of the High Court 1980 which is only meant for court pleadings. I have issued a separate written judgment in respect of this application. However, counsel for objector still made the submission that the government valuer used sales of vacant land as comparables and that he did not consider the improved value of the land. I am of the opinion that despite the dismissal of the amendment application, the objector is not precluded from making the said submission because the ground stated in the notice of objection is broad, ie that the *superintendent failed to give adequate consideration to the real market value of the said land and the said crop of mature oil palm trees.* Therefore, the methodology employed by the government valuer to assess market value comes within the ambit of the above mentioned broad ground of objection.

CASE OF THE OBJECTOR

[6] The complaint of the objector may be summarised as follows. The 28.69 acres of land which was the subject of resumption by the Sarawak Government is part of a large oil palm plantation. The uncontested evidence is that the subject land was planted with oil palm trees sometime between 1993 and 1995. The normal lifecycle of an oil palm tree is 25 years. Therefore, at the date of resumption on 30 November 2006, the oil palm trees were mature. However, the government valuer used sales of vacant land as comparables and assessed the market value of the subject land at RM4,000 per hectare. By doing so she

ignored the improved value of the land. This argument is not strictly correct, as the government valuer compensated the objector for the number of oil palm trees on the subject land at RM48 per tree based on crop compensation table found in a departmental circular. Her surveyor reported that there were 3,876 oil palm trees on the land. She made a downward revision of 10% as stated in the report for condition and age of tree and for intercropping in accordance with the crop compensation table. Her final assessment of the value of the oil palm trees on the subject land was RM181,627. The total compensation that she calculated was RM114,760 for the subject land plus RM181,627 for oil palm trees which equals to RM296,387. Counsel for objector criticised the use of the crop compensation table. He submitted that the crop compensation table 'has no force in law and is not accepted by Board of Valuers, Appraisers and Estate Agents, Malaysia'. In support he cited the following passage from the judgment of John Koh JC in *Austral Enterprise Bhd v The Superintendent of Land And Survey, Bintulu Division* (Land Reference No 15–02 of 2006(BTU) (unreported):

> RW1 in cross-examination had confirmed that in his valuation report (exh R1) the crop compensation of RM48 per tree maximum rate of crops compensation was derived from p 18 item 77 of the valuation Branch Circular No 2I2005 of the land office. Learned counsel for the objector had submitted that this method of valuation is unsustainable and obviously inadequate and goes against s 60(1)(d) of the Code which requires the award to take into account the damages sustained to the objector's actual earnings. *The court considers that RW1 using the departmental schedule which has no force in law,* the respondent has erred in law in relying such computation for crops compensation without taking into consideration the requirement of s 60(1)(d) of the Land Code in respect of the actual financial loss the objector would suffer from the loss of producing oil palms by the acquisition of the land they are planted on. (Emphasis added.)

[7] The government valuer told the court that the crop compensation table that she used was issued in the nineties but added that the most recent one was issued in 2010. As for myself, I would have considered accepting the crop compensation table if the government valuer had given evidence that the value of RM48 per oil palm tree was based on some sort of expert opinion, either from the Agriculture Department or from the oil palm industry. However, she merely said that the crop compensation table is found in the departmental circular, that it is the 'Standard Table' in Sarawak and that 'it had been agreed to by the State Cabinet'. In the premise, there is no expert evidence that RM48 is the fair market price for a matured oil palm tree that is generating income for the landowner. I, therefore, rule that the objector had successfully challenged the method of valuation of the government valuer. In the premises, I shall now proceed to consider the fair market value of the subject land. In this task, I was assisted by two assessors who are qualified valuers. Nonetheless, it is not an easy task for one simple reason. In the instant case, both the government valuer and

the objector's valuer did not use any comparables from sales of land planted with matured oil palm in the vicinity of the subject land. The government valuer only managed to use neighboring sales of vacant land as comparables whereas the objector's valuer said that 'to find perfect comparables is impossible'. I suppose this is the reason the government valuer used sales of vacant land as comparables and added the value of the oil palm trees by using the crop compensation table. I shall now discuss below the method of valuation used by the objector's valuer.

METHOD OF OBJECTOR'S VALUER

[8] The primary method used by the objector's valuer is the discounted cash flow ('DCF') method. This is an income based method. The amount of cash inflow from sales of produce from the plantation and cash outflow due to expenses after taking into account variables such as world palm oil prices and market conditions is used to estimate the value of oil palm land. The objector's valuer said that he used this method because of the on-going nature of an operational estate. Perhaps it is best that I let the objector's valuer explain the method he employed in his own words which is as follows:

> Q21 Please explain the Discounted Cash Flow method?
>
> A21 The Discounted Cash Flow approach is an income based method of valuation. The market value to be derived arises from the interest and rights held by the landowner of the land title areas and the benefits of the sales of oil palm planted thereon. These interest and right, involve the rights to sell the fresh fruit bunches (hereinafter referred to as 'FFB') harvested from the plantations.
>
> This method of valuation therefore involves, first, the assessment of the cash inflow from the annual gross sale income of the FFB. As the FFB are sold on ex-mill basis, this can be derived directly with no further deductions made for other logistical costs of sales.
>
> Secondly, the cash outflow, ie the total production costs to derive the sales income (including general charges, maintenance and manuring costs, harvesting & collecting costs, etc) are deducted to arrive the net cash flow (net income).
>
> Thirdly, the net cash flow (income) is discounted at an appropriate rate of return to reflect the investor/entrepreneur's rate of return taking into consideration the risks involved to earn the income (profit), opportunity costs of his capital and other factors. We adopted a discount rate of 10.5% for oil palm cultivation reflecting that a 5.78% margin spread above long term risk free yield rate is sufficient to remunerate industry and entrepreneur return on investment and 8% for reversionary value.

> Lastly, the basic land value is added. The basic land value is the scrub value or value to which the planted land reverts at the end of the economic life of the oil palms and includes the infrastructure on the estates and saving in clearing cost.

[9] The objector's valuer told that the court this method is adopted by the Malaysian Valuation Standards set up by the Board of Valuers, Appraisers and Estate Agent, Malaysia. He also told the court that the DCF method is also used by the Securities Commission. The objector's valuer's assessment of the market value of the subject land after using this method is RM594,512.55 or RM20,721 per hectare.

[10] In the recent case of *Wangsa Mujur Sdn Bhd v The Superintendent of Lands and Surveys, Miri Division and two other cases* 2009 (Land Reference Nos 15–01 of 2009 (MR)/1 15–02 of 2009 (MR)/2 and 15–02 of 2009 (MR)/2), Rhodzariah bt Bujang J commented on the DCF method as follows:

> It is appropriate for me to state now that I have rejected both methods of valuation canvassed by the private valuers for these reasons.
>
> Although both assessors assisting me at the trial, Hj Radzali Alision, private valuer and Norhisam bin Shafie, from the Department of Properties and Valuation, have stated that other methods of valuation such as those canvassed above by the private valuers are acceptable for income generating properties, but Norhisham has cautioned that there is still the element of uncertainty in using the discounted cash flow method (as recommended in LR No 15–02 of 2009) as the rate of return is very subjective. He further said, any difference in the figure, even 1% would affect the proposed market value. All these, he opined, even when the court can accept the accuracy of the data used by the valuer in computing the market value using that method, ie the cash inflow and outflow, the price for fresh fruit bunches, yield profile and production costs since compiling the data there was heavy reliance by the valuer on the information and statistic published by the Palm Oil Research Institute of Malaysia and Malaysian Palm Oil Board Industry.
>
> I heeded the caution expressed by him and in rejecting the investment method (used in the other two cases), I was of the view that the projections and variables needed to be incorporated into it to arrive at the analysed market value of the land based on the self-serving data supplied by the objector to their valuer with respect to their palm oil production and income, (which were necessary for the computation) rendered the method, undesirable.

[11] I should mention here that the same Assessors mentioned by Her Ladyship assisted me in this case. Encik Norhisam expressed a similar caution in this case. I am of the view that his opinion is not without foundation. It is a notorious fact that the world price of palm oil, which is one of the variables in DCF method, fluctuates constantly. Furthermore that DCF method, to all intents and purposes, is based on income projection and is dependent on data

supplied by the management. Therefore, the DCF method may be suitable in forecasting the income and value of the stock of plantation companies over a given period of time but may be less reliable in assessing the current market value of land planted with oil palm. I shall, therefore, follow the above cited decision of Rhodzariah bt Bujang J and reject the DCF method as a suitable method in assessing the market value of land. I am also fortified in my conclusion by two reported authorities that were not cited to me. The two cases are not land compensation cases but the judgments therein highlighted the unreliability of using the DCF method to value land. In *Glory Century Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2000] MLJU 419 which is an appeal by way of case stated from the decision of the Special Commissioners of income tax, the principal issue was the acquisition price of shares of a company (Capital Dynasty Sdn Bhd) that had been disposed of by the appellant. The subsidiary issue that arose was the market value of a property known as Lot PTD 63695, Mukim Tebrau, Daerah Johor Bahru that was owned by the said company. The market value of the said land was assessed by the appellant's valuer and the respondent's valuer by using the comparison method. However, the comparables used by the appellant were lots that were located in the city centre and this fact resulted in a higher valuation. The appellant's valuer then relied on the DCF method as a 'countercheck' to support the said valuation. The Special Commissioners of Income Tax rejected the DCF method. Faiza Thamby Chik J upheld rejection of the DCF method as well and said as follows:

> The discounted cash flow method is merely an extension of the residual method and it will not produce a value which can reflect the nature of the land as at date of valuation as needed for the purpose of the Real Property Gains Tax Act 1976 but, instead it reflects the value of land after the date of valuation which seems to have been completely developed with the proposed buildings.
>
> This method also uses a lot of variables and mathematic models such as the cost of development, the period in which the project is expected to be completed, profit and risk factor, the price of completed units and etc. and since it can be obtained by way of estimates (pp 186–190 of exh C) *then it can be adjusted to obtain a desired figure or value.* (Emphasis added.)

[12] The DCF method was also rejected for the purpose of valuation of a hotel property in the case of *Choo Oh Kim & Ors v Mok Yuen Lok & Ors (Naza Properties Sdn Bhd, intervener)* [2005] 6 MLJ 49 because it was based on projected income. Mohd Noor Hj Abdullah J said as follows:

> I find the comparison method and the depreciated replacement cost method applied by the plaintiff's valuers more appropriate and relevant than the discounted cash flow method applied by the defendants valuer.
>
> The former is more accurate. The latter assumed that the Hotel is operational, that the room tariff and the occupancy rate is so much that the projected income for tenyears is so much, less all sorts of expenditure. The assumption that second Penang

> Bridge benefitted the Hotel is now proven wrong. The terror strikes, SARS, tsunami and travel advice are unforecasted demerits. The Valuer himself admitted that there was no history of earning and no stream income to support the projected room tariffs and occupancy rate, and the projected multitude of expenditure. I therefore reject the defendant's valuers method of valuation.

USE OF SALES OF PLANTATION COMPANIES AS COMPARABLES

[13] The alternative method employed by the objector's valuer is the sales of equity of oil palm plantation companies, namely, sale of BHB Plantation, Bahtera Plantation and Sachiew Plantation. Taking the sale of BHB Plantation as it is a fully matured and operational oil palm plantation and after making adjustment for time lapse and location, the objector's valuer arrived at a market value of RM840,000 for the subject land or RM29,414.69 per hectare. Counsel for the respondent submitted the above sales were not sales of land but sales of equity in the plantation companies. She cited authorities that say that the safest guide to determine the fair market value is sales of land possessing similar advantages in the same neighbourhood and on which due adjustment must be made for dissimilarities. There are a plethora land compensation case authorities on this point (see *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] MLJ 69, *Bukit Rajah Rubber Co Ltd v Collector of Land Revenue, Klang* [1968] 1 MLJ 176, *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 and *Guan Seng Co Ltd, Taiping v Pentadbir Tanah Daerah Larut dan Matang, Taiping* [1994] 1 MLJ 4). Counsel for the respondent also cited a passage from *Compulsory Land Acquisition, Malaysia and Singapore* (2nd Ed), by N Khublall to submit that land is not something like stocks and shares which can be bought and sold in a stock exchange. The said passage quoted by counsel for the respondent actually echoed the following statement of Lord Romer in Privy Council case of *Vyricherla Narayana Gajapatiraju (Raja) v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 from India (cited by the Federal Court in *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd* [1966] 1 MLJ 243):

> It is perhaps desirable in this connection to say something about this expression 'the market price'. There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by the market value …

[14] I find that there is merit in the submission of counsel for the respondent for the following reasons. The sales in question concerned sale of equity of plantation companies. They are not in respect of sales of land. It is likely that

the major asset of the companies in question is land planted with oil palm. However, counsel for the respondent did not point out in her submission whether the companies in question owned other assets apart from oil palm land and if so, whether the value of those assets had been discounted for purpose of comparison. Otherwise, the sale price of these companies may not truly reflect the value of the oil palm land in question. Therefore the market value arrived at by this method may not be accurate.

SUPERINTENDENT AWARD IN THE VICINITY

[15] Counsel for the respondent also cited a superintendent award under s 51 in respect of oil palm land in the vicinity which was also acquired for the purpose of the same Sabah-Sarawak Gas Pipeline project. The said Superintendent Award was the subject of a Land Reference case under s 56 of the Sarawak Land Code, namely *Usaha Sepadan Sdn Bhd v Superintendent of Land and Survey, Bintulu Division* (No 15–02 of 2009 (BTU)). In the said case, the superintendent had awarded compensation for the acquired oil palm land at RM25,000 per hectare. The owners had argued that the fair market value was RM58,917 per hectare. The High Court assessed the market value at RM25,000 using previous superintendent awards in respect of oil palm plantations. Counsel for objector submitted that RM25,000 per hectare is a fair price for matured oil palm plantation. I shall consider this method later in my judgment.

OPINION OF ASSESSORS

[16] Both assessors were of the opinion that the assessment of RM4,000 per hectare by the government valuer was unfair as it did not take into account the improved value of the land. Encik Radzali Allision did not disapprove the use of the DCF method. However, he was of the opinion that the building value should not be used in the calculation as the acquired land is a tiny portion of the entire plantation. After making his own adjustment to discount the building value, he arrived at a market value of RM568,925 or RM19,830 per hectare. As I have stated earlier, the other assessor, Encik Norhisham bin Shafie disapproved the DCF method. However, he approved the use of the sale of the BHP and Sachiew Plantations as suitable comparables. After making adjustment for the time factor, he opined that the adjusted market value for the subject land is within the range of RM16,500 per hectare to RM22,000 per hectare. Therefore he agreed with the objector valuer's valuation that the market value of the land is RM594,512.55 or RM20,721.94 per hectare.

DECISION

[17] Under s 64 of the Sarawak Land Code, in case of a difference of opinion

between the court and the assessors, or either of them, the opinion of the court shall prevail. The two assessor's have a difference of opinion on the method of valuation. However, despite taking a different route, the market value they arrived at is approximately the same, ie RM19,830 per hectare and RM20,721.94 per hectare. I have already given my reasons why the method of the government valuer is not acceptable in this case. I have also given my reasons why I rejected the DCF method and the use of sale of equity of plantations companies as comparables. The normal comparison method of valuation would have entailed using sales of land planted with matured oil palm trees in the vicinity of the subject land. In this case, neither the government valuer nor the objector's valuer produced such comparables. However, the objector's valuer had produced a superintendent's award that I referred to earlier. In the case of *Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd* [1992] 1 MLJ 331, the Supreme Court said that it is not wrong for the learned judge to accept the evidence of a previous acquisition award as a relevant consideration indicative of the market value of the property although the normal and more accurate method is by using comparable sales. In *Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth v Bertam Consolidated Rubber Co Ltd* [1990] 1 MLJ 268 the Supreme Court approved the use of previous acquisition awards by the High Court when comparable sales are not available. Harun Hashim SCJ said as follows:

> The learned judge also found that there were no comparable sales for the purpose of valuing the acquired land. We agree. The government valuer relied on evidence of awards made and accepted, sufficiently proximate in point of time to the relevant date for purposes of the present valuation. Such a method of valuation is acceptable: *Bertam Consolidated Rubber Co Ltd v CLR, Butterworth* [1984] 1 MLJ 164 (folld).

[18] In the Sarawak case of *Zawasima Sdn Bhd v Superintendent of Land Surveys Kuching Division,* [2006] 7 MLJ 488, Clement Skinner J said that although the superintendent awards in the same area at the same time would provide evidence of market value:

> the court will be astute to look at the previous award in a meaningful way so as to ascertain if the land being dealt with in the previous awards share similarities with the subject land or otherwise and whether adjustments need to be made for location, size, shape and so on.

[19] In the instant case, no comparable sales of land planted with matured oil palm were furnished by the valuers. Therefore, the previous acquisition award in the *Usaha Sepadan* case furnished by the respondent's valuer can be used as a comparable provided there are similarities. I find that apart from the time factor of 18 months which was highlighted by counsel for the respondent, there are sufficient similarities for the use of the said acquisition award as a comparable. The subject land and the land in the *Usaha Sepadan* case were both

part of oil palm plantations. The oil palm trees in both cases were matured. The balance of lease in respect of the subject land is 49 years whereas the balance of lease in respect of the *Usaha Sepadan* land is 51 years. The lands in both cases are in the MM Division (about 200 km apart) and were acquired for the same project, ie the Sabah and Sarawak Gas Pipeline project managed by Petronas. The *Usaha Sepadan* land was acquired 18 months after the subject land. In the premises, I shall make a downward revision of 20% to arrive at the market value of the subject land. As the *Usaha Sepadan* land was valued by the superintendent at RM25,000 per hectare, with 20% downward revision, I shall assess the market value of the subject land at RM20,000 per hectare. At RM20,000 per hectare, the market value of the 28.69 hectares subject land is RM573,800. Counsel for objector submitted that 10% upward revision for damages due to severance of the plantation is in order. He submitted that the acquisition of 28.69 hectares had partitioned the plantation. Counsel for the respondent submitted that there is no severance on the ground because the gas line pipes were laid underground and one could still go across the acquired land. The general manager of the objector testified that heavy vehicles exceeding 35 tons had to take a longer route as there was a weight limit imposed by Petronas on the vehicles that crossed the acquired area. This is what he said:

> Q: Can you explain why does your company have to build road parallel to both sides of pipeline?
>
> A: Before the Petronas lay the pipeline we can travel to the other side because we have main road and field road. After pipeline laid, this was restricted. Petronas only allowed the vehicles and machineries not exceeding 35 tons, that is why because 7.6 km, so now we propose 7 bridges so that our vehicles can go through. If we want to go from one point to another, we have to travel longer distance. That is why we want to construct parallel road linking all 7 bridges in order to have smooth operation, for 10 travelling time and distance.

[20] During cross-examination, the same witness said that the average heavy machinery of the objector is more than 35 tons. Counsel for objector submitted that there should be a 10% upward revision for severance. He submitted the case of *Ng Bee & Anor v Collector of Land Revenue, Kuala Pilah* [1972] 1 MLJ 269 where approximately 11% was allowed for severance. In accordance with the submission of counsel for objector, I shall award 10% or RM57,380 for severance. The total amount of compensation is therefore RM631,180.

ADDITIONAL CLAIMS OF OBJECTOR

[21] The objector has also claimed the following damages:

(a) Cost of rectification due to pipeline clearing: RM243,124

(b) Costs of construction of seven bridges and culverts: RM2,719,682

(c) Costs of main road construction parallel to pipeline: RM647,636
Total additional claim for damages: RM3,610,442

[22] One of the assessors, Encik Radzali Alision agreed with the objector's valuer that the above damages should be allowed whereas Encik Norshisham Shafie opined mat the damages were the responsibility of Petronas. As this is strictly a legal issue and not a matter of assessing market value, I shall have regard only to the submissions of counsel and to s 60 of the Sarawak Land Code. Section 60(1)(c) and (d) states as follows:

> 60 (1) In determining the amount of compensation to be awarded for land resumed under this Part, the Court shall take into consideration the following matters and no others —
>
> (a) …
>
> (b) …
>
> (c) the damage, if any, sustained by the person interested, at the time of the Superintendent's taking possession of the land, by reason of severing such land from his other land;
>
> (d) the damage, if any, sustained by the person interested, at the time of the Superintendent's taking possession of the land, by reason of the resumption injuriously affecting his other property, whether movable or immovable, in any other manner or his actual earnings;

[23] In respect of the costs of rectification due to pipeline clearing or damage to road and bridges by Petronas, it is obvious from the evidence of the objector's witnesses, the damage occurred after the acquisition was completed. In the premises, the cause of action cannot lie against the superintendent who is a different entity from Petronas. In respect of costs of constructing new bridges and roads, as correctly pointed by counsel for the respondent, this is not a damage that had been sustained by the objector at the time of the acquisition, simply because the roads or bridges did not exist. In fact, this 'damage' was not brought up during the s 51 inquiry before the superintendent as the notice of objection or statutory statement did not refer to it. It is actually a prospective loss and not an actual loss, ie the costs of overcoming severance to the land because Petronas has imposed a weight limit on the tonnage of vehicles that can cross the land under which they had laid the gas pipeline. The objector had already claimed an adjustment of 10% for severance to their land. The quotation in respect of the costs of construction of the new infrastructure was only prepared by the objector's valuer four years after the acquisition and after Petronas had started laying the gas pipelines. In my view, the use of the past tense in s 60(1)(c) and (d), ie 'damage, if any, sustained', means that only actual loss at the time of resumption of the land by the superintendent is envisaged

and not future loss occasioned by a third party. I also note that damages caused by a third party after acquisition has been disallowed in another case. In *Wangsa Mujur Sdn Bhd v The Superintendent of Lands and Surveys, Miri Division and two other cases*, damage caused to a ramp was disallowed because it occurred after acquisition. I shall therefore disallow the above claims.

[24] In conclusion, I have assessed the total compensation at RM631,180 After taking into account the amount of RM296,387 already received by the objector under protest, the government is liable to pay the difference, ie RM334,793. I shall also order interest of 4% from the date of resumption to date of payment on the said sum. No order as to costs in accordance with s 67(c) of the Sarawak Land Code as the total claim of the objector which is RM4,260,000 exceeds by twenty per cent the amount awarded above.

Total compensation accessed at RM631, 180 with interest and no order as to costs.

Reported by Kohila Nesan